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May 13, 2016

By ECFS

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street SW
Washington, DC 20554

Re: Notice of Ex Parte Communication

**MB Docket No. 15-216
Implementation of Section 103 of the STELA Reauthorization
Act of 2014 -- Totality of the Circumstances Test**

**MB Docket No. 16-41
Promoting the Availability of Diverse and Independent Sources
of Video Programming**

Dear Ms. Dortch:

On May 11, 2016, Anne Lucey of CBS Corporation, Susan Fox of The Walt Disney Company, Jared Sher of 21st Century Fox, Inc., Christopher Wood of Univision Communications Inc., Kevin Caves of Economists Incorporated and I (the “Broadcaster Representatives”) participated in a series of meetings with the Commission personnel listed below as additional recipients of this letter.

The Broadcaster Representatives addressed allegations by certain distributors regarding the bundling of television stations and affiliated non-broadcast programming in retransmission consent negotiations. In particular, we explained that, as a matter of competition law and marketplace reality, the Commission should reject these distributors’ unsupported and counterintuitive arguments that bundled programming offers should be deemed to be a *per se* violation of the “good faith” bargaining obligation under Section 325 of the Act and Section 76.65 of the Rules.

We explained, first, that bundling is consistent with competitive marketplace considerations. Indeed, both competition policy and antitrust law regard bundling as a pro-competitive and pro-consumer practice, precisely because it reduces transaction costs and promotes economies of scale and scope, while at the same time enabling both suppliers and purchasers -- here, programmers and distributors -- to introduce new and innovative services to the consumers they both serve. Accordingly, antitrust doctrine establishes a pro-competitive presumption in favor of bundling. And, for the same reason, the Commission has long

COVINGTON

Marlene H. Dortch
May 13, 2016
Page 2

recognized its own presumption in favor of bundling in the context of retransmission consent negotiations, just as Congress intended in the 1992 Cable Act. *See Implementation of the Satellite Home Viewer Improvement Act of 1999, Retransmission Consent Issues: Good Faith Negotiation and Exclusivity*, First Report and Order, 15 FCC Rcd 5445, para. 56 (“*2000 SHVIA Implementation Order*”); S. Rept. 102-92, S. 12, Cable Television Consumer Protection and Competition Act of 1992, at 35-36 (noting that broadcasters may negotiate with cable systems not just with respect to monetary compensation, but also “other issues . . . , such as joint marketing efforts . . . or the right to program an additional channel on a cable system.”).

Proponents of a *per se* rule against bundling have presented no empirical evidence that the practice causes any harms to consumers or to competitors in the video marketplace. Moreover, the Broadcaster Representatives explained that bundled offerings containing multiple elements typically result in more productive, mutually beneficial negotiations precisely because they provide the parties with greater flexibility -- stated colloquially, with more chips to play -- in the bargaining process. We explained that a Commission mandate delinking negotiations for multiple related services is therefore counterintuitive, inefficient and likely to lead to potentially disruptive disputes -- in addition to being, not incidentally, beyond the scope of the Commission’s authority. For all of these reasons, the Commission itself has acknowledged for more than 15 years that “to arbitrarily limit the range or type of proposal that the parties may raise in the context of [retransmission consent] will make it more difficult for broadcasters and MVPDs to reach agreement. By allowing the greatest number of avenues to agreement, we give the parties latitude to craft solutions to the problem of reaching [retransmission consent].” *2000 SHVIA Implementation Order* at para. 56.

The Broadcaster Representatives also noted that proponents of a *per se* rule have failed to identify any market change -- much less a market failure -- since the good faith negotiation regime was adopted. On the one hand, the record is replete with evidence of the increasingly competitive dynamic of the supply side market segment, as myriad and continually increasing sources of content vie for the attention of distributors, advertisers and viewers alike. On the other hand, meanwhile, the video distribution market continues its relentless trend toward consolidation and concentration.

Further, the Broadcaster Representatives explained that, to the extent some distributors have alleged that broadcasters engage in “forced bundling,” a rubric that is a proxy for a “take-it-or-leave-it” offer, such conduct is prohibited by the existing good faith bargaining rules. See 47 C.F.R. § 76.65 (b)(iv) (refusal “to put forth more than a single, unilateral proposal” is presumptive evidence of bad faith). There is therefore no need for the Commission to adopt any changes to its rules in order to address allegations of “forced bundling.” We also noted that, in any case, and as the Commission itself has recognized, the antitrust laws provide an adequate remedy to ensure that bundling is not used toward anticompetitive ends.

Finally, the Broadcaster Representatives emphasized that they do not believe that any changes in the good faith negotiation rules are warranted in light of the absence of evidence either of market failure or of the inefficacy of the current rules. They expressed concern that any modification of the existing regulatory regime be consistent with the Congressional directive embodied in Section 325 and with competition policy and the Commission’s own precedent, and

COVINGTON

Marlene H. Dortch
May 13, 2016
Page 3

that it be based on empirical evidence rather than anecdote, contrived assumptions and overheated rhetoric.

This letter is being submitted electronically pursuant to Section 1.1206(b) of the Commission's Rules. Please contact the undersigned if you have any questions about this submission.

Respectfully submitted,

**CBS Corporation, The Walt Disney
Company, 21st Century Fox, Inc., and
Univision Communications Inc.**

By: _____/s/
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